INTERIOR BOARD OF INDIAN APPEALS

Estate of Margaret Fisher Leader Molina

27 IBIA 254 (02/39/1995)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ESTATE OF MARGARET FISHER LEADER MOLINA

IBIA 94-39 Decided March 29, 1995

Appeal from an order after reopening issued by Administrative Law Judge Richard L. Reeh in Indian Probate IP OK 119 P 90-1.

Reversed.

1. Indian Probate: Wills: Construction of

> The principal criterion guiding the construction of an Indian will is the intention of the testator, if that intention can be reasonably ascertained.

APPEARANCES: F. Browning Pipestem, Esq., and Dena L. Silliman, Esq., Norman, Oklahoma, for appellant; Tony R. Burns, Esq., Anadarko, Oklahoma, for appellees.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Elmer Parker seeks review of a November 19, 1993, order after reopening issued by Administrative Law Judge Richard L. Reeh in the estate of Margaret Fisher Leader Molina (decedent). For the reasons discussed below, the Board reverses Judge Reeh's order.

Background

Decedent, Comanche Allottee 1135, died testate on February 24, 1990, at the age of 94. Her last will, executed on October 4, 1989, stated at paragraph 3:

> SECOND, I have previously made a will with the Indian Department, Anadarko, Oklahoma, whereby I have given land listed with that agency and as identified therein, to my sister, Helen Parker, or to her heirs, and I hereby do affirm and devise said property described in said will to my sister or to her heirs.

Administrative Law Judge Sam E. Taylor held a hearing in decedent's estate on July 29, 1991. On August 15, 1991, he issued an order approving her 1989 will.

By memorandum dated November 8, 1991, the Superintendent, Anadarko Agency, Bureau of Indian Affairs, sought clarification from Judge Taylor concerning the meaning of paragraph 3 of the will. In order to address the Superintendent's concern, Judge Taylor reopened the estate, stating:

> The decedent purportedly had made three (3) previous Last Will and Testaments at the Anadarko Agency, dated October 7, 1985, February 20, 1985, and August 28, 1980, respectively, and one Revocation, dated December 31, 1981.
>
> It appears that there is truly a question of interpretation as to the decedent's intent relative to the devisee in paragraph 3 of her Last Will and Testament, dated October 4, 1989.

(Nov. 22, 1991, Order Reopening Estate at 1).

Following Judge Taylor's retirement, Judge Reeh held a hearing on reopening, at which several witnesses testified concerning their understanding of decedent's testamentary intent. On November 19, 1993, Judge Reeh issued the order on appeal here. The order states:

> The only issue for consideration in this Reopening relates to the interpretation of apparently divergent provisions of two wills. The first, dated October 7, 1985 (the "1985" or "former" will) provides, at paragraph Second,
>
> > "I give, devise and bequeath all of the property of which I may die possessed, real, personal and mixed to my sister, Helen Fisher Parker, for lifetime use only; and upon her death to vest in Henry Parker, for lifetime use only; and upon his death, to vest in Darrell Parker and Marshall Parker in equal shares."
>
> The second, dated October 4, 1989 ("last will"), provides
>
> > ". . . I have previously made a will with the Indian Department, Anadarko, Oklahoma, whereby I have given land listed with that agency and as identified therein, to my sister, Helen Parker, or to her heirs, and I hereby do affirm and devise said property described in said will to my sister or to her heirs."
>
> Confusion relating to the interpretation of these provisions is prevalent because the provisions appear to conflict.
>
> The principal criterion guiding an administrative law judge in construing an Indian Will is always the intention of the willmaker, if that intention can be reasonably ascertained. See Estate of Paul Wilford Hail, 13 IBIA 140 (1985). A second guiding principle is that words used in a will are used with their usual and popular meaning unless it appears from the context that some other meaning is intended. See Page on Wills, § 30.21; Maddock v. Haines, 88 F.2d 350, 112 A.L.R. 279 [(7th Cir. 1937)]; United States v. 575.52 Acres of Land, 118 F. Supp. 923 [(D.N.H. 1954); and Gormly v. Edwards, 155 P.2d 985 (Okla. [1945]).

> In [decedent's] case, the context surrounding ". . . to my sister or to her heirs" appears to suggest that, if Helen [Parker] pre-deceased her, then [decedent's] estate should be distributed to Helen Parker's heirs-at-law.
>
> A study of the context, however, reveals [decedent's] actual intention. Her initial expression in "Paragraph 3. Second" was to affirm the Indian trust devises made in her 1985 will. Those words are clear. All testimony and arguments which might suggest otherwise have been carefully considered. It is determined that the last will's phrase or her heirs was merely the will-maker's shorthand manner of expressing the original terms of [the] 1985 Will's Paragraph Second. Thus, Paragraph Second of the October 7, 1985, Will, supra, remains the operative provision for distribution of [decedent's] Indian trust estate, as follows:
>
> > Paragraph Second (October 7, 1985, Will).
> >
> > TO: Darrell Parker and Marshall Parker in equal and undivided shares of one-half (1/2) each SUBJECT TO LIFE USE in Helen Fisher Parker FOLLOWED BY LIFE USE in Henry Parker.
> >
> > WHAT PROPERTY: All of the decedent's Indian trust property. [Emphasis and capitals in original.]

(Nov. 19, 1993, Order at 2-3).

Appellant appealed Judge Reeh's order to the Board. Briefs were filed by appellant and by Henry and Doris Parker. 1/

Discussion and Conclusions

Appellant makes a number of arguments on appeal. His principal argument, however, is that Judge Reeh ignored the plain language of decedent's 1989 will and improperly rewrote the will by incorporating portions of a revoked will.

Among other things, appellant objects to the fact that judge Reeh mentioned only one of decedent's three earlier wills, although her 1989 will referred only to a will. Appellant notes that all three pre-1989 wills were made at the "Indian Department," i.e., BIA, in Anadarko, Oklahoma, and that all three covered decedent's interests in trust land.

Appellant executed a will on August 28, 1980, in which she devised her entire estate to her sister, Helen Parker. She revoked that will on

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1/ Doris Parker is the wife of Henry Parker. She is not an heir of either decedent or Helen Parker and is not a devisee under decedent's will. Therefore, she is not an interested party here. However, Henry Parker is clearly an interested party.

December 31, 1981. On February 20, 1985, she executed a will in which she devised her entire estate to Helen Parker "for lifetime use only; and upon her death to vest in the heirs of her body." On October 7, 1985, she executed the will discussed by Judge Reeh. As noted above, that will created a life estate in Helen Parker, followed by a life estate in Henry Parker, with remainder in Darrell Parker and Marshall Parker. 2/

In her 1989 will, decedent again changed her testamentary scheme. She devised her trust land as described in the above-quoted paragraph 3. In paragraph 4, she stated:

> THIRD, I hereby give, devise and bequeath all of the residue of my estate, excepting therefrom that land given to my sister referred to above, to my second cousin, Lottie Christian, particularly being my home in Chickasha, Oklahoma, household furniture and other personal property, including jewelry, cash assets, and all other assets, real or personal, as might be a part of my estate. [3/ Emphasis in original.]

As appellant contends, Judge Reeh appears to have considered the October 7, 1985, will as the only possible subject of the reference in the 1989 will. Although Judge Reeh did not specifically state his reasons, he may have chosen the October 7, 1985, will because it was the latest of the three and, at the time the 1989 will was drafted, the only one which had not been revoked. These would normally be reasonable bases for identifying the October 7, 1985, will as the one referred to in the 1989 will. The Board observes, however, that the February 20, 1985, will actually comes closer to fitting the description given in the 1989 will, i.e., a previous will in which decedent had devised her trust property "to [her] sister, Helen Parker, or to her heirs."

Rather than attempt at this point to determine which earlier will the 1989 will had reference to, the Board proceeds to the larger question of whether Judge Reeh erred by incorporating a disposition made in any earlier will into the 1989 will.

Testimony was given at the hearing concerning decedent's general testamentary intent. However, there was no testimony from anyone who was present when the 1989 will was executed. 4/ Nor did any of the witnesses testify that decedent had discussed her intentions with them at a time contemporaneous with the execution of her 1989 will. In view of the fact that decedent changed her testamentary scheme several times, testimony which is not date-specific is of little probative value here.

2/ None of these prior wills was in the probate record, although all were provided by Judge Reeh's office at the Board's request.

When prior wills are related to a probate decision, they should be made part of the official probate record.

3/ This devise, which evidently included only non-trust property, was the subject of a proceeding in state court.

4/ The attorney who drafted the will was deceased. Although he had testified earlier in the state court proceeding concerning the will, his testimony could not be located.

Further, there were conflicts in the testimony. Some witnesses testified that decedent wished all of her heirs to share in her estate. Others testified to the contrary. The Board finds the hearing testimony unhelpful and concludes that the decision here must rest on the language of the 1989 will.

Concerning that language, Judge Reeh stated: "[Decedent's] initial expression in 'Paragraph 3. Second' was to affirm the Indian trust devises made in her [October 7,] 1985 will. Those words are clear." The Board cannot agree that decedent's words are clear in affirming a previous devise. The operative words of paragraph 3 are: "I hereby do affirm and devise said property described in said will to my sister or to her heirs." A rudimentary grammatical analysis of this clause makes it clear that the word "devise" is used as a verb, not as a noun. Thus, "devise" cannot be the object of the verb "affirm." Rather, the object of both verbs is "said property described in said will." In other words, decedent affirmed "said property described in said will" and devised "said property described in said will."

Judge Reeh also concluded that the term "or her heirs" in the 1989 will was a shorthand method of expressing the devise made in the October 7, 1985, will. One problem with this conclusion is that the October 7, 1985, will did not make a devise which could properly be expressed in shorthand form as a devise to Helen Parker's heirs. On October 4, 1989, Henry Parker was a presumptive heir of Helen Parker, but so were his five siblings. 5/ Darrell Parker and Marshall Parker, who were Henry's children, were not presumptive heirs of Helen Parker on October 4, 1989, because their father was still alive. Thus, at the time the 1989 will was drafted, the group of devisees named in the October 7, 1985, will excluded all but one of Helen Parker's presumptive heirs and included two individuals who were not her presumptive heirs. A description of this group as "her [i.e., Helen Parker's] heirs" would have been extremely imprecise.

Judge Reeh evidently concluded that decedent believed, however incorrectly, that her October 7, 1995, will had made a devise to the heirs of Helen Parker. Such a conclusion would necessarily be based upon (1) an assumption that decedent did not understand the meaning of the term "heirs"; (2) an assumption that decedent did not remember the terms of her October 7, 1985, will; and/or (3) an assumption that the attorney who prepared the 1989 will either failed to elicit decedent's true intent or failed himself to understand the meaning of the term "heirs."

Such assumptions become unnecessary, however, and a strained interpretation of the term "heirs" is avoided, if the reference in the 1989 will is interpreted as one to decedent's February 20, 1985, will, which made a devise to Helen Parker's "heirs of the body." Although the term "heirs of

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5/ Helen Parker died on Dec. 31, 1989. In a Sept. 23, 1993, order approving her will, Judge Reeh determined that her heirs were her six children: Kenneth Parker, Elmer Thomas Parker, Lillian Margaret Parker Boles (Teresa Ann Eavenson), Henry Leon Parker, Ruth E. Parker Lynn, and Charles Alfred Parker. See Estate of Helen Fisher Parker, 27 IBIA 271 (1995).

the body" is not identical to the term "heirs," 6/ it is at least closer in meaning to that term than is the group of devisees named in the October 7, 1985, will.

In the end, it may not be necessary to determine which of the earlier wills was meant. The wording of paragraph 3 of the 1989 will suggests the strong possibility that the reference to a prior will was intended simply to identify the land intended to be devised by paragraph 3, rather than to devise that land in accordance with the term of a prior will. If this is the proper interpretation, it would not matter which earlier will was intended to be referenced because all covered the same property. The Board finds this interpretation most consistent with decedent's actual words of devise: "I hereby do affirm and devise said property described in said will to my sister or to her heirs."

[1] As Judge Reeh noted, "[t]he principal criterion in construing an Indian will is the intention of the testator, if that intention can be reasonably ascertained." Estate of Paul Wilford Hail, 13 IBIA at 143. The Board finds that decedent's intent may be reasonably ascertained from the language of paragraph 3 of her 1989 will. It finds further that her intent was, as stated therein, to devise her trust land to Helen Parker or the heirs of Helen Parker.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, Judge Reeh's November 19, 1993, order is reversed. Helen Parker having predeceased decedent, decedent's trust estate shall be distributed to the heirs of Helen Parker.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

6/ Under Oklahoma law, the term "heirs of the body" excludes spouses and adopted children. Estate of Frank (Tate) Nevaquaya Tooahimpah, 21 IBIA 222 (1992). In Helen Parker's case, however, the two terms would have described the same group of individuals in 1985 and in 1989. This is so because her husband had died in 1975 and she had no adopted children.